85-1494

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OF AMERICA

October Term, 1985

FORELAWS ON BOARD, an unincorporated association, and LLOYD MARBET,

Petitioners,

v.

PETER JOHNSON, as Administrator of the Bonneville Power Administration, et al.,

Respondents,

and

PUBLIC POWER COUNCIL, PACIFIC POWER & LIGHT COMPANY, and MARTIN MARIETTA ALUMINUM, INC.,

Respondent-Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW.

A. Did Congress intend to deny attorney fee awards under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(B), to prevailing parties in actions against the United States when the losing legal position of the government was no more than arguably reasonable ?

B. Can a defeated government legal position which is found to be unreasonable and taken in defense of arbitrary and capricious agency action be substantially justified within the meaning of 28 U.S.C. § 2412(d)(1)(B) so as to defeat a prevailing party's request for legal fees under the Equal Access to Justice Act?

II. PARTIES TO THE PROCEEDING.

The caption of this petition contains the names of all parties to the original proceeding in the Ninth Circuit Court of Appeals. Since petitioners state questions which relate only to the federal respondent, however, Bonneville Power Administration (BPA), and its liability for attorney fees under the Equal Access to Justice Act (EAJA), petitioners do not believe that the Public Power Council, Pacific Power & Light Company, or Martin Marietta Aluminum, Inc., has an interest in the outcome of this petition.

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III. REPORTED DECISION.

The decision on the merits of petitioners' case is reported as Forelaws on Board v. Johnson, 743 F.2d 677 (9th Cir. 1985).

IV. JURISDICTION.

This Court has jurisdiction to review the judgment of the Ninth Circuit Court of Appeals by writ of certiorari, 28 U.S.C. § 1254(1), to resolve a conflict in the Circuit Courts of Appeal over construction of an important federal question: the standard of conduct required of a losing federal party necessary to defeat an application for attorney fees made by prevailing plaintiff under EAJA, 28 U.S.C. § 2412(d).

The decision on the merits was decided September 25, 1984, and amended January 21,

1985. Petitioners herein, the prevailing plaintiffs in the original proceeding before the Ninth Circuit Court of Appeals, petitioned for an award of attorney fees under EAJA. That petition was denied by Order entered July 3, 1985. Petitioners sought rehearing, which the court denied by order filed on November 13, 1985. This petition for writ of certiorari is timely filed on February 11, 1986.

V. STATUTE UNDER CONSIDERATION.

28 U.S.C. § 2412(d)(1)(A) and (B) (1985) provide:

> (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection(a), incurred by that party in any civil action against the United States (other than cases sounding in tort) including proceedings for judicial review of agency action unless the court finds

that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment, submit to a court an application * * * . The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based which is made in the civil action for which fees and other expenses are sought.

VI. STATEMENT OF THE CASE.

This is a petition for a writ of certiorari to review the denial of attorney fees to prevailing parties under the EAJA where the conduct of the United States was held to be "substantially justified" without factual basis and in reliance upon authority which required only that government action be merely reasonable.

Petitioners contend that the correct rule is announced by other federal courts which hold that the legal position of the losing federal party must be more than merely reasonable in order to defeat a fee application made pursuant to the EAJA. Further, petitioners urge this Court to review the question of whether the losing legal position of the United States can be reasonable or substantially justified as a matter of law if the trial court concludes

that the legal position was unreasonable under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) and the applicable statutes, and that the underlying agency conduct which is the subject of the government's legal position is found to be arbitrary and capricious.

The underlying case on the merits was brought as an original proceeding pursuant to the Pacific Northwest Electric Power Planning and Conservation Act (Regional Act) 16 U.S.C. §§ 839-839h, to force BPA to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361, under original jurisdiction of the Ninth Circuit Court of Appeals, 16 U.S.C. § 839f(e)(5). Decision was entered on September 25, 1984, after a trial consisting of trial briefs and oral argument. Petitioners herein were the plaintiffs in

the case before the Ninth Circuit. BPA was a defendant.

To date, petitioners herein have been the only parties to successfully pursue claims against BPA under the Regional Act. In its opinion on the merits, the Ninth Circuit found that BPA had violated the Regional Act, the APA, and NEPA. It found BPA's interpretation of the Bonneville Project Act and NEPA to be "unreasonable." 743 F.2d at 684 n.2. The court further found that BPA had acted arbitrarily and capriciously in not conforming to the mandates of the Regional Act and NEPA. 743 F.2d at 685. Yet, in a subsequent order, the same panel held that BPA's legal position had been "substantially justified" for the purposes of defeating an application for fees under 28 U.S.C. § 2414(d)(1)(A).

The relevant factual framework of the underlying lawsuit is described in Forelaws on Board v. Johnson, 743 F.2d 677 (9th Cir. 1985), Appendix C. BPA is a federal agency established by the Bonneville Project Act of August 20, 1937. It serves as the federal marketing agency for electric power produced at federal dams in the Pacific Northwest. 16 U.S.C. § 832(f). BPA markets this power pursuant to four principal statutes: the original Bonneville Project Act, as amended, 16 U.S.C. § 832; the Pacific Northwest Preference Act, 16 U.S.C. § 837; the Federal Columbia River Transmission System Act, 16 U.S.C. § 838; and the Regional Act, 16 U.S.C. § 839.

Briefly stated, a significant feature of the Regional Act is the greatly expanded authority it gives BPA to help meet the Pacific Northwest's electric power needs.

Congress required BPA within 9 months of the Regional Act's effective date, (by September of 1981) to make "initial" offers of long-term contracts to its customers. The Regional Act then provided for an additional 12 months in which the BPA and the offerees were to negotiate final power sales agreements. These contracts were to be both for power sales and a feature referred to as the "residential exchange" contracts with investor-owned utilities, designed to offer rate relief to residential customers of investor-owned utilities in the Pacific Northwest.

Under § 5(b) of the Regional Act, BPA is required to offer long-term "firm power" sales contracts to all requesting utilities in the Pacific Northwest for service to each utility's firm power load in excess of the utility's own resource capability to

serve its load. BPA is also required, under § 5(d) of the Regional Act, to offer a long-term contract to each of BPA's existing direct-service industrial customers (DSIs) in the region. Additionally, BPA is authorized under § 5(d)(3) to offer long-term firm power sales contracts to federal agency customers in the region.

BPA started contract negotiation in February of 1981. Negotiations continued for 6 months while BPA drafted and redrafted contracts based upon the results of the bargaining sessions. Although the express language of the Act contemplated a 21-month negotiation period (9 months before "initial" offer and a year of subsequent negotiation), BPA early and adamantly took the position that it would offer final contracts by September 1981.

Representatives John Dingell and Richard Ottinger, chairmen of

> the subcommittees of the House Energy and Commerce Committee, pointed out in a July, 1981 letter to the Administrator, which is a part of the record in this case, that BPA moved "with greater speed than necessary in initiating contract negotiations." After making the initial offer mandated within nine months of the Act's passage, "[t]he customers and BPA had a whole year to negotiate and execute a contract."

743 F.2d at 684.

The National Environmental Policy Act, 42 U.S.C. § 4321-4361, requires every federal agency to prepare an environmental impact statement (EIS) for "major federal actions affecting the human environment." BPA did not prepare an EIS on the power sales contracts it offered pursuant to the Regional Act 9 months after its passage in September 1981. As the August 20, 1981, memorandum, prepared for the signature of BPA attorney Omar Halvorson and addressed to the Assistant General Counsel for the

Environment of the U.S. Department of Energy [Appendix D] makes clear, BPA had predetermined months before that date not to prepare and EIS. It also shows that BPA had never complied with applicable DOE regulations for determining that an EIS would not be done. BPA totally ignored the July 1981 letter of chairmen Dingell and Ottinger.

Forelaws on Board challenged BPA's failure to prepare an EIS to accompany the long-term power sales contracts entered into under the Regional Act. The Ninth Circuit held that BPA had unreasonably interpreted its authority and arbitrarily and capriciously refused to consider environmental alternatives. The panel ordered BPA to prepare a full and complete EIS on the power sales contracts. The court afforded plaintiffs "meaningful

relief" by maintaining continuing jurisdiction over the case and signaling BPA that it must consider the contracts flexible and subject to accommodation to the results of the ordered EIS through negotiation. To date, BPA has merely begun the scoping and public comment process.

VII. ARGUMENT.

A. THE WRIT OF CERTIORARI SHOULD BE GRANTED IN ORDER TO RESOLVE CONFLICT IN THE FEDERAL CIRCUIT COURTS OF APPEAL ON WHETHER A MERE SHOWING THAT AGENCY CONDUCT WAS REASONABLE IS SUFFICIENT TO DEFEAT AN EAJA FEE REQUEST.

The rule applied by the Ninth Circuit erroneously denies fees in cases where the government conduct is not substantially justified and is inconsistent with the intent of Congress. A prevailing litigant will be awarded attorney fees and expenses unless the government can prove that its position was "substantially justified or

that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). BPA's position in this case was not substantially justified within the meaning of this phrase as used in the EAJA. In its denial of petitioners EAJA fee request, the court merely cited United States v. First National Bank of Circle, 732 F.2d 1444 (9th Cir. 1984), and Foster v. Tourtellotte, 704 F.2d 1109 (9th Cir. 1983), to support its conclusion that fees "under 28 U.S.C. § 2412(d) are not available because defendants' position in this case of first impression was substantially justified." Order of July 3, 1985, Appendix A.

Tourtellotte, a death-with-dignity case, was a fact situation without guiding legal precedent. But the rule of the case is a general one: The standard for determining whether the government was

substantially justified is one of "reasonableness." 704 F.2d at 1112.

In First National Bank of Circle, the court repeated that the burden of substantial justification is met when the government shows "that its case had a reasonable basis in law and fact." 732 F.2d 1447. The court remanded for necessary findings on the issue of substantial justification sufficient to defeat a fee application. 732 F.2d at 1448. Neither case announced a rule that the government's position is always substantially justified in any case of "first impression." Such a rule would be inconsistent with a rule of "reasonableness," since not every "novel" legal interpretation is well-taken or necessarily reasonable.

In Devine v. Sutermeister, 733 F.2d 892 (Fed. Cir. 1984), for example, the

National Treasury Employees Union (NTEU) sought EAJA fees for its successful defense against the Office of Personnel Management (OPM) on OPM's appeal of an arbitration award. OPM argued that fees should not be awarded because some of the issues raised on appeal were cases of first impression.

> OPM's main argument in opposition to an award of fees is that the appeal presented issues of first impression and thus "defines the position of the United States as 'substantially justified.'" See, Cherry v. United States, 4 CtCl 20, 23 (1983). While some of OPM's arguments on appeal might be characterize as "novel," this characterization does not detract from the fact that its positions were simply unsupportable given the great weight of statutory, regulatory, and judicial authority to the contrary. In some contexts, the novelty or importance of the issues may validate, for purposes of substantial justification, an otherwise marginal appeal by the government. But see Spencer v. NLRB, 712 F.2d 539, 558-59 (DC Cir. 1983), where it is suggested that the government should bear the expense of litigation in a

> long-shot "test case." In this case, however, the novelty of the government's position cannot compensate for the paucity of support in favor of that position, A prevailing party's entitlement to fees under the EAJA should not depend on the creativity of the government in fashioning novel, but meritless, arguments.

733 F.2d at 895.

The cited Ninth Circuit cases do hold that in order to defeat a claim of a prevailing party for fees the government must show only that its position was "reasonable." The Ninth Circuit apparently relies heavily upon House Report No. 1418, 96th Cong., 2d Sess., reprinted in [1980] U.S. Code Cong. & Ad. News 4984, 4989-90.

Yet the legislative history of the Equal Access to Justice Act taken as a whole and the legislative history of The Equal Access to Justice Act Extension and Amendment [P.L. 99-80], passed on August 5,

1985, clearly show contrary intent.

House Report No. 120, 99th Cong., 2d Sess., reprinted in [1985] U.S. Code Cong. & Ad. News 132, 138, explains the correct interpretation of "substantially justified":

> Another problem which has developed in the implementation of the Act has been the fact that courts have been divided on the meaning of "substantial justification." Several courts have held correctly that "substantial justification" means more than merely reasonable. Because in 1980 Congress rejected a standard of "reasonably justified," in favor of "substantially justified," the test must be more
>
> than mere reasonableness.

In Senate Report 586, 98th Cong., 2d Sess. 10 (August 8, 1984) (hereinafter 1984 Senate Report), the Senate Committee on the Judiciary discussed the substantial justification standard:

> More importantly, however, the Senate Judiciary Committee considered and rejected an amendment to the EAJA which would have changed the pertinent language from "substantially justified" to "reasonably justified." S. Rpt No. 2533, 96th Cong., 1st Sess., p. 8 (1979). This refusal indicates that the test should, in fact, be slightly more stringent than one of reasonableness. A number of cases have so held.

Other circuits and a number of lower federal courts have concluded that the government cannot discharge its burden by merely pointing to its briefs and maintaining some semblance of a legal theory supporting its position. As noted in Environmental Defense Fund v. Watt, 722 F.2d 1081, 1085 n.5 (2d Cir. 1983:

> Because the Senate Judiciary committee rejected an amendment [to the EAJA] which would have changed the pertinent language from substantially justified to reasonably justified, some courts have suggested that the statutory test requires something more than ordinary reasonableness.

See also, Spencer v. NLRB, 712 F. 2d 539,

558 (D.C. Cir. 1983): "[T]he test should, in fact, be slightly more stringent than one of reasonableness."

The government bears the burden of proving that its position was substantially justified, despite the fact it was the losing party. "[T]he strong deterrents to contesting government action require that the burden of proof rest with the Government." H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 11, reprinted in [1980] Code Cong. & Ad. News 4984, 4989. (Hereinafter 1980 House Report). Moreover, a "strong showing" must be made to meet to meet this burden. Id. at 4997. One court of appeals has summarized the issue:

> Under the EAJA . . . the government qua litigant bears a heavier burden than the private party: It must affirmatively demonstrate substantial justification for its position.

Environmental Defense Fund v. Watt, 722

F.2d 1081, 1087 (2d Cir. 1983).

The reason that the burden rests with the federal litigant is clearly expressed in the legislative history of the EAJA.

> The committee believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the Government was unreasonable.

1984 House Report at 10-11, U.S. Code Cong. & Ad. News, supra, at 4989.

In Photo Data, Inc. v. Sawyer, 533 F. Supp. 348, 351-2 (D. DC 1982) the court also pointed out:

> Another reason for placing the burden of proof on the government stems from the underlying, and deeply imbedded, conflict between the historical reluctance of courts to shift fees and the remedial purpose of the Act.

The same court noted that:

> The general purpose of the Act is to insure the vindication of rights of parties who might otherwise be precluded from the

> adjudicatory process due to the prohibitive costs of seeking justice.

Id. at 352 n.6.

In Berman v. Schweiker, 713 F.2d 1290 (7th Cir. 1984), another court described the Congressional intent served by placing the burden of proof upon the federal litigant:

> The EAJA also has a parallel objective of deterring the government from pursuing litigation--either in initiating it or defending against it--when the government's position is not substantially justified. According to House Report 1418, the prevailing bill--S. 265--"rests on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy."

1984 House Report, at 10.

In the present case, each of the objectives identified by Congress and the courts which require that the burden of

proof be placed upon the government is present. First, there is no serious question that BPA has "control" of any possible evidence that might exist to justify its position. Second, plaintiffs have already incurred considerable costs and would be even further prejudiced if they were now required to make another evidentiary showing. Third, plaintiffs have gone far beyond their own vested interests and effected a decision with far-reaching public consequences. Placing the burden upon the government to justify its original, erroneous position, will have a salutory effect on future decision--making.

Thus, the legislative history of the original EAJA has been relied upon by other federal courts to require a more stringent burden of proof and justification than mere

reasonableness. Nevertheless, the Ninth Circuit evidently does not require more than reasonableness, as articulated in the two cases relied upon in the decision and order in this case.

There is therefore a serious lack of uniformity of decision between the interpretation of substantial justification in the Federal, Seventh and Second Circuits and other lower federal courts and the rule of the Ninth Circuit Court of Appeals. This conflict requires review by this Court to establish a uniform rule of law. Magnum Import Co. v. Coty, 262 U.S. 159, 43 S.Ct 531, 67 L.Ed 922 (1923); Universal Camera Corp. v. NLRB, 340 U.S. 498, 71 S.Ct 456, 95 L.Ed.2d 479 (1951). To the extent that the Ninth Circuit rule is contrary to the legislative history of EAJA in the Senate and the intent of the 1985 amendments, it

thwarts the intent of Congress by absolving the government of liability for attorney fees and costs in situations where such awards are intended by Congress.

The proper construction of the EAJA is an important question of public policy. The implementation of a Congressional policy to achieve equal and fair opportunity for financially disadvantaged parties in public interest litigation with the government is not merely a private matter unique to petitioners.

For example, in 1976 Congress amended 42 U.S.C. § 1988 to allow for attorney fee awards in actions brought to redress racial discrimination (Civil Rights Attorney's Fees Awards Act of 1976). After endorsing the concept of the private attorney general, the Senate Report stated:

> The idea of the "private attorney general" is not a new

one, nor are attorneys' fees a new remedy. Congress has commonly authorized attorneys' fees in laws under which the "private attorneys general" play a significant role in enforcing our policies. * * * In cases under these laws, fees are an integral part of the remedy necessary to achieve compliance with our statutory policies. As former justice Tom Clark found, in a union democracy suit under the Labor-Management Reporting and Disclosure Act (Landrum-Griffin),

> Not to award fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. * * * Hall v. Cole, 412 U.S. 1 (1973), quoting 462 F.2d 777, 780-81 (2d Cir 1972).
>
> * * *
>
> Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. See, Bradley, supra; Mills v. Electric Auto-Lite, supra, 396 US 375 (1970).

Senate Report No. 1011, 94th Congress, 2d Session, reprinted in [1976] U.S. Code Cong. & Ad. News 5910-12.

The appropriate standard for award of EAJA "private attorney general" attorneys fees is a significant policy question requiring review by this Court. Shapiro v. United States, 235 U.S. 412, 35 S.Ct 122, 59 L.Ed.2d 291 (1914); Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 75 S.Ct 614, 99 L.Ed.2d 987 (1955).

B. AGENCY CONDUCT WHICH IS UNREASONABLE AND ARBITRARY AND CAPRICIOUS CANNOT BE EITHER REASONABLE IN LAW AND FACT OR SUBSTANTIALLY JUSTIFIED FOR PURPOSES OF DEFEATING A CLAIM FOR ATTORNEYS FEES.

1. CONGRESS INTENDED FEE AWARDS TO BE MADE WHEN AN AGENCY ACTED UNREASONABLY OR ARBITRARILY.

House Report 120, 99th Cong., 2d Sess., reprinted in [1985] U.S. Code Cong.

& Ad. News 132, 138, shows a clear legislative intent to allow attorney fee awards to prevailing parties when the United States violated the APA standards of review:

> Especially puzzling, however, have been statements by some courts that an administrative action may be substantially justified under the Act even if it must be reversed because it was arbitrary and capricious or was not supported by substantial evidence. Agency action found to be arbitrary or capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the Act. Only the most extraordinary special circumstances could permit such action to be found substantially justified under the Act.

2. THIS CASE WAS DECIDED ON LONGSTANDING NEPA PRECEDENTS AND WELL KNOWN RULES OF STATUTORY CONSTRUCTION.

In its arguments to this court, BPA denied that an EIS was required, because (1) the contracts did not have a signifi-

cant impact on the human environment, and (2) the time constraints of the Regional Act impliedly exempted it from complying with NEPA. A brief review of the court's opinion shows these arguments were not even reasonable, much less substantially justified.

In the first instance, BPA could hardly have been serious in its belated claim that the contracts did not have significant impacts on the human environment, as the court pointed out at 743 F.2d 680-83. In fact, this argument is patently frivolous, as the court stated:

> [BPA's] own "Environmental Report" reflects acknowledgement of environmental consequences of a contract but defended the noncompliance with NEPA on grounds of time constraints.

743 F.2d at 683.

The court could find no basis in law or fact for BPA's principle argument

either. The court set forth the legislative history of NEPA at 743 F.2d 683 and found "nothing" in the legislative history or the language of the Regional Act to support BPA's position that NEPA was not applicable. "On the contrary, given the clear statutory emphasis on environmental concerns, see 16 U.S.C. §§ 839, b, d f(j) & k, an exemption from NEPA requirements is inconsistent with the congressional objectives of the Regional Act." Id.

At 743 F.2d 684, the court adopted the legal reasoning advocated by plaintiffs. "The only time limitation is that the Secretary begin negotiations and offer contracts within nine months. The statute allows a further year before acceptance is required." The reason that this conclusion is inescapable was argued by plaintiffs throughout the entire progress of the

v Sutermeister, supra, where:

> The novelty of the government's position cannot compensate for the paucity of support in favor of that position. Prevailing party's entitlement to fees under the EAJA should not depend on the creativity of the government in fashioning novel, but meritless, arguments.

733 F.2d at 895.

3. BPA'S REFUSAL TO PREPARE AN EIS WAS UNREASONABLE, ARBITRARY AND CAPRICIOUS.

The 1985 amendments to EAJA instruct that the position of the agency is to include the record with respect to the agency action or failure to act which is the basis of the civil action, not just the legal position of the Department of Justice in court. Natural Resources Defense Council v. EPA, 703 F.2d 700 (3d Cir. 1983) (dissenting opinion cited with approval in 1984 Senate Report, supra, at 8-9); Rawlins v. Heckler, 725 F.2d 1192

(9th Cir. 1984).

In Photo Data, Inc. v. Sawyer, supra, the court reasoned that focusing only upon the narrow litigation posture as the federal "position" which need be justified would contravene the remedial purposes of EAJA. "In order to ensure evenhandedness the Court must scrutinize not only the government's theory in defending the legal issues raised but also the occurrences that impelled plaintiff to bring this action." 533 F. Supp. at 352.

The approach of the Photo Data court is the correct one. In the recent Senate Report on the amendments and extension of the Equal Access to Justice Act, the Senate Judiciary Committee explained:

> [T]he approach that is most faithful to the aims of the EAJA is one that evaluates both the agency's underlying posture that led to the litigation and the actual litigation conduct of the

government. The Committee explicitly recognizes this in Section 2412 of the bill and thus resolves any ambiguity that existed heretofore . . . . The primary concern of Congress in enacting the EAJA was to provide an incentive for paries, aggrieved by unreasonable government action, to undertake litigation to vindicate their rights, as well as to deter arbitrary or unjustified agency action. The legislative history of the EAJA is replete with references to administrative abuse which Congress sought to limit through enactment of the attorney fee-shifting device . . ..

. . . Although it is true that Congress referred to the litigating position of the United States during its discussion of the "substantial justification" question, Congress never contemplated situations "in which the litigation position is essentially an apology for its administrative action forcing the litigation." NRDC, 703 F. 2d at 715.

Indeed, to follow an interpretation that "position of the United States" refers only to the government's litigation stance is to imply that no matter how outrageously improper the agency action, and no matter how intransigently a wrong

> position has been maintained by the agency prior to the litigation, and no matter how many times the same agency repeats the same offense, the statute has no application as long as employees of the Department of Justice act reasonably when they appear in court. NRDC 703 F.2d at 715. There have been numerous gross examples of the results that obtain from consideration of only the government's "litigation " posture [numerous citations omitted].

1984 Senate Report, supra, at 8-9.

Using the strong Senate Committee language as a guide, the Court should consider the wealth of informed input and public concern directly addressed to BPA that an EIS was necessary which BPA ignored.

In fact, the trial court found the refusal to consider the public comments was "arbitrary and capricious." Petitioners submit that arbitrary and capricious agency conduct cannot later be characterized as a legal position of substantial merit. The

case of first impression need never have arisen, had the agency acted reasonably in the first instance.

Also relevant is the preemptory manner in which BPA unilaterally changed the mandatory sanctions against customers that did not meet conservation standards after "agreeing" with several environmental groups to include such sanctions in the contracts. A year after agreeing to the language in question, BPA rescinded it through Federal Register Notice as an "error." 47 Fed. Reg. 25310 (June 10, 1983). Reneging on negotiations, coupled with the fact that BPA had already made a decision in early 1981 not to do an EIS, and manufactured time constraints leads to the conclusion that this is one of those cases in which the Department of Justice's litigation position was but an "apology"

for the premature, intransigent BPA decision to abandon NEPA.

In many instances, the same factors which underlie the bringing of the suit, including the prelitigation conduct of the government, are precisely those factors which illustrate or even lead to the insubstantiality of the federal litigant's position. For example, this suit need not have been brought. BPA had ample time, notice of Congressional intent, and a clear duty to prepare an EIS. BPA was an active participant for years in the legislative process which eventually resulted in the Regional Act. Its prelitigation posture towards environmental concerns was cavalier, at best, and perhaps more accurately

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described as capricious and in disregard of DOE regulations as well.

Dated:
February 11, 1986

Respectfully submitted,

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Richard A. Slottee
Counsel of Record

_____

Linda K. Williams
Linda K. Williams P.C.

APPENDIX A

ORDER DENYING PETITION FOR ATTORNEYS FEES

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 82-7319

FORELAWS ON BOARD, an unincorporated association; and Lloyd Marbet, Plaintiffs, v. Peter JOHNSON, as Administrator of the Bonneville Power Administration, Department of Energy; James Edwards, as Secretary of the Department of Energy and the United States of America, Defendants.

Filed July 3, 1985

Philip Winberry, Clerk,

U.S. Court of Appeals

Before: SHROEDER, FARRIS and REINHARDT, Circuit Judges.

Plaintiffs applications for attorney fees under the Equal Access to Justice Act are denied. Although plaintiffs are prevailing parties for the purpose of at

described as capricious and in disregard of DOE regulations as well.

Dated:
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Respectfully submitted,

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Filed July 3, 1985

Philip Winberry, Clerk,

U.S. Court of Appeals

Before: SHROEDER, FARRIS and REINHARDT, Circuit Judges.

Plaintiffs applications for attorney fees under the Equal Access to Justice Act are denied. Although plaintiffs are prevailing parties for the purpose of at

least a partial award of fees, they are not entitled to fees under 28 U.S.C. § 2412(b) because the litigation did not produce a common fund or benefit within the meaning of Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), and Southeast Legal Defense Group v. Adams, 657 F.2d 1118 (9th Cir. 1981). Fees under 28 U.S.C. § 2412(d) are not available because defendants' position in this case of first impression was substantially justified. See United States Natiional Bank of Circle, 732 F.2d 1444 (9th Cir. 1984); Foster v. Tourtellotte, 704 F.2d 1109 (9th Cir. 1983).

[unsigned]

APPENDIX B

ORDER DENYING RECONSIDERATION OF ORDER DENYING ATTORNEYS FEES

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 82-7319

FORELAWS ON BOARD, etc., et al., Petitioners, vs. PETER JOHNSON, etc., et al., Respondent. PUBLIC POWER COUNCIL et al., Respondent-Intervenors.

Filed November 13, 1985

Clerk U.S. Court of Appeals

Before: SHROEDER, FARRIS and REINHARDT, Circuit Judges.

The petition for rehearing of the courts's order denying fees on appeal, receiver July 17, 1985, is denied.

[unsigned]

FORELAWS ON BOARD v. JOHNSON, C.A.9,1984.

743 F.2d 677.

FORELAWS ON BOARD, an unincorporated association; and Lloyd Marbet, Plaintiffs, v. Peter JOHNSON, as Administrator of the Bonneville Power Administration, Department of Energy; James Edwards, as Secretary of the Department of Energy and the United States of America, Defendants.

No. 82-7319. United States Court of Appeals, Ninth Circuit. Argued and Submitted March 6, 1984. Decided Sept. 25, 1984. As Amended Jan. 21, 1985.

[743 F2d 679]

Original Proceeding to Review the Bonneville Power Administration Offer of Initial Contracts Pursuant to the Pacific Northwest Electric Power Planning and Conservation Act.

Before SCHROEDER, FARRIS, and REINHARDT Circuit Judges.

SCHROEDER, Circuit Judge.

This is a challenge to the Bonneville Power Administration's offers of long term contracts for power delivery pursuant to the Pacific Northwest Electric Power Planning and Conservation Act (Regional Act), 16 U.S.C. # 839-839h (1982), without compliance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. ## 4321-4361 (1976). We have previously held that this is a review of final agency action which, under the Regional Act, must be filed originally in this court rather than in the district court. Forelaws on Board v. Johnson, 709 F.2d 1310 (9th Cir.1983) (Forelaws I).

Plaintiffs seek an order compelling the preparation of an Environmental Impact Statement and enjoining operation of the contracts. We hold that an Environmental Impact Statement is required and should be utilized in connection with consideration of any further amendments, to which NEPA will also apply and for which additional EIS's may be required. We decline, however, to enjoin operation of the contracts pending completion of the initial EIS.

Statutory Background

On December 5, 1980, the Regional Act became law. It is a "unique piece of energy legislation" designed to allocate the finite supply of inexpensive hydroelectric power, generated on the Columbia River System, among competing consumers as well

as to provide for the acquisition of new energy resources. See Central Lincoln Peoples' Utility District v. Johnson, 735 F.2d 1101, 1106 (9th Cir.1984). In the early 1970's, BPA, faced with increasing demand for low-cost hydroelectric power an possible power shortfalls, notified its nonpreference customers that their power contracts would not be renewed and informe its preference customers that it could not satisfy any load growth after 1983. Aluminum Co. of America v. Central Lincol Peoples' Utility District, --- U.S. ----, 104 S.Ct. 2472, 2477-78, 81 L.Ed.2d 301 (1984). In response to the resulting confusion, Congress passed the Regional Act, which was designed to avert "regional civil war" by allocating BPA's finite supply of hydroelectric power between competing consumers and by providing for the acquisition of new energy resources.

See Central Lincoln Peoples' Utility District v. Johnson, 735 F.2d 1101, 1106 (9th Cir.1984). The Regional Act required BPA to offer new long-term contracts to

[743 F2d 680]

both preference and nonpreference customers "(a)s soon as practicable within nine months after December 5, 1980." 16 U.S.C. # 839c(g)(1). Each customer was given one year from the date of the offer to accept the contract. 16 U.S.C. # 839c(g)(2). Thus, within 21 months of the Act's effective date, a new system of contracts allocating BPA's supply of hydropower was to be in place.

The Act also required BPA to encourage energy conservation by its customers as well as to take measures to protect the environment of the Pacific Northwest. 16 U.S.C. # 839b, d, f(j). Congress said the

Act was to be "construed in a manner consistent with applicable environmental laws." 16 U.S.C. # 839. The questions presented in this case thus implicate two of the Acts' most important objectives: a new system of contracts governing BPA's delivery of power to its customers and an energy program for the Pacific Northwest that is sensitive to environmental concerns.

Procedural Objections to this Suit

Before reaching the merits of the case, there are two preliminary procedural objections by the defendant BPA, and intervenors Martin Marietta Aluminum, Public Power Council, and Pacific Power & Light Company, relating to plaintiffs' standing and the timeliness of the action.

Intervenor Martin Marietta contends tha

Forelaws lacks standing because it has not alleged that BPA's contract offers caused it any injury within the zone of interest to be protected by NEPA, citing Port of Astoria, Oregon v. Hodel, 595 F.2d 467, 474 (9th Cir.1979). The complaint, however, alleges that plaintiff Forelaws is an environmental group whose members live in the Pacific Northwest and that one of its members, Mr. Marbet, is a resident of that region and a consumer of electric power there. /1/ Those allegations coupled with the allegations of the environmental consequences of the contract are sufficient to establish standing. See United States v. SCRAP, 412 U.S. 669, 683-90, 93 S.Ct. 2405, 2414-17, 37 L.Ed.2d 254 (1972) (even general allegations of potential harm by one who lives in or uses an area demonstrate standing); Pacific Legal Foundation v. State Energy Resources, Etc., 659 F.2d

903, 911-12 (9th Cir.1981), cert. denied, 457 U.S. 1133, 102 S.Ct. 2956, 73 L. Ed.2d 1348 (1982). See also Sierra Club v. Morton, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972) ("(A)n organization whose members are injured may represent those members in a proceeding fo judicial review.").

The timeliness question arises from th confusion generated by the statute's provision that suits challenging final actions of the BPA administrator "shall be filed within the United States court of appeals for the region ... within ninety days ...." 16 U.S.C. # 839f(e)(5). The complaint in this case was not actually filed with the clerk of this court until more than 90 days after the action being challenged. However, it is undisputed tha Forelaws attempted to file a complaint the day before the expiration of the 90-day

period, but the clerk of this court rejected the complaint because normally this court does not have jurisdiction of original complaints. In fact the plaintiffs had also filed a complaint in the district court, and jurisdictional issues were still in litigation. See Forelaws I, 709 F.2d at 1311-13. Our clerk's mistaken rejection of the complaint when it was timely offered should not bar its consideration, and it should be deemed timely filed. See Loya v. Desert Sands Unified School District, 721 F.2d 279, 280-81 (9th Cir.1983). We therefore must consider the merits of plaintiffs' claim that BPA has violated NEPA by failing to prepare an environmental impact statement.

The Contracts' Environmental Significance

Section 102(2)(C) of NEPA, 42 U.S.C. # 4332(2)(C), requires that federal agencies, "to the fullest extent possible,"

[743 F2d 681]

do a detailed statement of the environmental impact of any proposed major federal action which would significantly affect the quality of the environment. /2/ BPA did not prepare an environmental impact statement in connection with its contract offers. It did what it termed an "Environmental Report," a document not contemplated by NEPA, and which did not analyze in detail any possible adverse environmental consequences of the contracts and ways that they might be avoided. The environmental report did not, in short, do what an environmental impact statement is supposed to do, and what plaintiffs contend under the provisions of NEPA, the agency was required to do.

BPA does not deny that these 145 contracts of 20-year duration constitute

major federal action. It argues that the contracts themselves do not significantly affect the human environment. It also argues more strenuously that the time limitations of the Regional Act indicate Congress's intent to waive NEPA's application to these contracts by making it impossible for the agency to comply with NEPA. We deal with each of these arguments in turn.

BPA initially contends that because Congress has mandated it to offer contracts, BPA had no discretion with respect to contract terms that might have varying effects upon the environment. Because the principal purposes of NEPA include making considerations of environmental concerns a part of the decision-making process, see Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 143, 102 S.Ct. 197, 201, 70

L.Ed.2d 298 (1981), other circuits have developed the principle that an EIS is not required where the agency's action is "mandatory." See, e.g., Pacific Legal Foundation v. Andrus, 657 F.2d 829, 839-40 & n. 13 (6th Cir.1981) (mandatory agency duty to list endangered species upon specified factual finding); South Dakota v. Andrus, 614 F.2d 1190, 1193 (8th Cir.), cert. denied, 449 U.S. 822, 101 S.Ct. 80, 66 L.Ed.2d 24 (1980) (non-discretionary acts not subject to NEPA); Natural Resources Defense Council, Inc. v. Berklund, 609 F.2d 553, 558 (D.C.Cir.1979) (NEPA not applicable when Secretary has no discretion as to coal leases).

The difficulty with BPA's position that the contract action was completely mandated by statutes is that, as BPA recognized in its environmental report, "the administrator possesses a great deal of discretion i

contract matters." This includes contract provisions directly aimed at environmental concerns. Congress expressly authorized the administrator to include, in the contracts, provisions designed to achieve the Act's environmental purposes, such as encouragement of conservation, development of renewable resources, fish and wildlife protection and enhancement. The content of these contract provisions is not mandated but is clearly discretionary. See Aluminum Co. of America v. Central Lincoln Util. Dist., --- U.S. ----, ----, 104 S.Ct. 2472, 2484, 81 L.Ed.2d 301 (1984) ("Because the Regional Act does not comprehensively establish the terms on which power is to be supplied ... under the new contracts, it is our view that the (BPA) has broad discretion to negotiate them.").

BPA nevertheless argues that we should regard its discretion as limited princi-

pally to matters of power allocation which,

[743 F2d 682]

it argues, as a matter of law, cannot affect the human environment. It relies upon our decision in City of Santa Clara v. Andrus, 572 F.2d 660 (9th Cir.1978), and Sierra Club v. Hodel, 544 F.2d 1036 (9th Cir.1976), for the proposition that federal agency actions that merely allocate federal power to different customers do not significantly affect the environment.

Although BPA accurately characterizes the holding of these cases, they do not control this case. City of Santa Clara and the relevant portion of the Sierra Club decision involved a simple determination of which customers were entitled to a finite supply of power. See City of Santa Clara, 572 F.2d at 680; Sierra Club, 544 F.2d at 1039-41. The contracts in this case involve considerations of far greater

historic and regional import and significantly affect the environment. For example, by defining the federal base system and "new large single loads" the contracts help determine the magnitude of BPA power obligations in the future and thus will have an impact upon long-range regional energy plans. See Port of Astoria, Oregon v. Hodel, 595 F.2d 467, 477-78 (9th Cir.1979) (holding that action creating significant new commitments of BPA power affecting future regional energy planning requires an environmental impact statement).

In addition, the contracts significantly affect the environment because they involve important policy choices affecting energy conservation. Incentives for conservation which could have been included in the contracts were suggested by several commentators during the time the agency was

developing its proposals. /3/ These incentives included rate schedules that reward users who succeed in reducing demand; encouragement of utilities to attach conservation related conditions to electric service; shortfall allocation plans which take into account utility conservation policies, and implementation of tiered rates to increase the incentive to conserve. BPA did in fact include certain measures in the contracts to encourage conservation, but they were fewe and weaker than those proposed by several public groups. In the absence of an environmental impact statement, we do not know to what extent BPA considered the merits of the other proposals and their feasibility from an environmental standpoint.

Still other significant environmental

aspects of the contracts are the fish and wildlife provisions, the most often commented upon environmental provisions of this statute. Several sections of the Act detail BPA's fish and wildlife responsibilities, 16 U.S.C. # 839(3)(6), b(e)(2), (h)(10) & (11), which include planning, management, protection, mitigation, and enhancement. See generally Blumm, Implementing the Parity Promise: An Evaluation of the Columbia Basin Fish and Wildlife Program, 14 Envtl.L. 277 (1984). In the record before BPA, a great many groups suggested provisions which would mitigate fishery damage and improve conservation efforts. /4/ As the National Marine and Fishery Service pointed out to BPA, a major purpose of the Regional Act was to treat fish and wildlife interests as coequal partners in management of the Northwest hydrosystem. Again, without an EIS, we do

not know to what extent these proposals were evaluated as feasible alternatives to the provisions eventually proposed.

Also undercutting BPA's present position is the fact that, despite the repeated insistence by plaintiffs and other groups, BPA never, throughout the period that it was developing its contract proposals, argued that the contracts were not federal

[743 F2d 683]

actions significantly affecting the environment. Rather, its "Environmental Report" reflects acknowledgement of environmental consequences of a contract but defended the noncompliance with NEPA on grounds of time constraints. We therefore hold that the contracts are significant federal actions affecting the environment and turn to the issue of time constraints.

BPA's principal argument in this case is that the statutory deadlines for contract

offer and acceptance made it impossible to prepare an EIS. The Regional Act, which was effective December 5, 1981, gave BPA until September 5, 1980, or nine months to offer the contracts. 16 U.S.C. # 839c(g)(1). Customers then had up to one year from the date of the offer to accept the contracts. 16 U.S.C. # 839c(g)(2).

NEPA's legislative history reflects Congress's concern that agencies might attempt to avoid any compliance with NEPA by narrowly construing other statutory directives to create a conflict with NEPA. Section 102(2) of NEPA therefore requires government agencies to comply "to the fullest extent possible." The Senate and House conferees, who added that language to the statute, explained it in the following manner:

> The purpose of the new language is to make it clear that each agency of the federal government shall comply with the directions set out in ... (Section 102(2)) unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible .... Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102.... (N)o agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

Conference Report, 115 Cong.Rec. (Part 29) 39702-703 (1969), quoted in Calvert Cliffs' Coordinating Committee, Inc. v. United

States Atomic Energy Commission, 449 F.2d 1109, 1114-15 (D.C.Cir.1971).

This Circuit recently echoed the conferees' concern for ensuring NEPA compliance. In State of California v. Block, 690 F.2d 753 (9th Cir.1982), we held that a section of the National Forest Management Act did not preempt NEPA because neither the statute nor its legislative history supported a NEPA exemption. Id. at 775. See also Southeast Alaska Conservation Council, Inc. v. Watson, 697 F.2d 1305, 1310 (9th Cir.1983) (compliance with environmental statutes strictly construed).

There is nothing in the legislative history or the language of the Regional Act suggesting that Congress intended an exemption from NEPA requirements. On the contrary, given the clear statutory emphasis on environmental concerns, see 16

U.S.C. # 839, b, d, f(j) & (k), an exemption from NEPA requirements is inconsistent with the congressional objectives of the Regional Act.

BPA, however, seeks to bring itself within the principle announced by the Supreme Court in Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma, 426 U.S. 776, 96 S.Ct. 2430, 49 L.Ed.2d 305 (1976). The Supreme Court there considered whether an EIS was required prior to a real estate developer's filing a disclosure statement under the Interstate Land Sales Full Disclosure Act, when that Act required that the statement be effective 30-days after filing. Observing that the preparation of an EIS often required many months, the Supreme Court held that NEPA presented "an irreconcilable and fundamental conflict"

with the 30-day requirement of the Interstate Land Sales Act. The 30-day requirement led the Court to conclude that when there is a "fundamental conflict of statutory duty," NEPA is inapplicable. Id. at 791, 96 S.Ct. at 2440.

BPA argues that the contract offer requirements fall squarely within Flint Ridge because BPA had only 30 days to [743 F2d 684]
prepare an EIS. Its argument is based not so much on what Congress required in the statute as it is on the schedule which BPA actually followed in the nine-month period which Congress provided for the development of a contract offer. During that period, BPA did not prepare an EIS but it did negotiate with customers, hold public meetings, and issue draft prototype contracts. Its activities can be summarized on the following time line:

December 5, 1980-Regional Act takes effect.

December 31, 1980-BPA puts together a list of the types of contracts to be offered as well as negotiating teams for each type.

January 23, 1981-Organization meeting for negotiating teams held. Teams, made up of BPA employees and customer groups, meet three days per week, all day, from February until August to consider various contract provisions. Notice of meeting mailed to all interested parties and posted at BPA headquarters. Mid-May, 1981-BPA holds three public meetings in Seattle, Boise, and Portland to receive public comment about the contracts. Sends summaries of the meeting with responses to the comments to all interested parties on June 8.
June 11, 1981-Draft prototype contracts

available for public inspection. See 46 Fed.Reg. 31238 (1981). BPA opens 30-day comment and review period.

July 13, 1981-End of comment period.
Late July to early August, 1981-Status drafts mailed to customers; contracts individualized.

August 28, 1981-Contracts offered to BPA customers.

September 5, 1981-End of statutory nine--month period.

BPA's position is that under the procedures it followed, which included six months of active negotiations before issuance of prototype contracts for inspection, the EIS would have had to have been prepared between June 11, 1981 when

the prototype contracts became available and July 13, 1981, the end of the comment period, and before BPA began final contract preparation. If such a restrictive time schedule was mandated in this case, then, under Flint Ridge, there would be a statutory conflict and an EIS need not have been prepared.

BPA's position, however, represents the type of "excessively narrow construction" that NEPA cautions against. /5/ The root of BPA's interpretation is its perception that the September 5, 1981 offers were already to have been negotiated and acceptable to the customers. Section 839c(g)(1) states:

As soon as practicable within nine months after December 5, 1980, the Administrator shall commence necessary negotiations for, and offer, initial long-term

contracts.... 16 U.S.C. # 839c(g)(1). The only time limitation is that the Secretary begin negotiations and offer contracts within nine months. The statute allows a further year before acceptance is required. 16 U.S.C. # 839c(g)(2). BPA argues that it could not begin an EIS until it had a "proposal" for federal action, or until the draft prototype contracts were available on June 11. But it does not explain why it was required to negotiate for six months before developing the contract proposals. Representatives John Dingell and Richard Ottinger, chairmen of subcommittees of the House Energy and Commerce Committee, pointed out in a July, 1981 letter to the Administrator, which is a part of the record in this case, that BPA moved "with greater speed than necessary in initiating contract negotiations." After making the initial offer mandated within nine months

of the Act's passage, "(t)he customers and BPA had a whole year to negotiate and execute a contract."

In fact the statute did not mandate the schedule which BPA followed. BPA could have used the initial nine months to formulate

[743 F2d 685]

a proposal, perform an EIS, and still have met the statutory deadline for making its contract offer and commencing negotiations. If necessary, BPA could have utilized a "fast track" EIS schedule to speed the process. See 40 C.F.R. # 1506.10(d).

Finally, the Supreme Court has recognized in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551, 98 S. Ct. 1197, 1215, 55 L.Ed.2d 460 (1978), that NEPA requires an agency to address all significant alternatives to a proposed action. See 42 U.S.C.

4332(2)(C). Under the "arbitrary and capricious" standard of review authorized by the Administrative Procedures Act, 5 U.S.C. # 706(2)(A), a court may require an agency's decision to be "based on a consideration of relevant factors." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971). This requirement that an agency examine alternative courses of action has long been a part of the APA's standard of review, see The Supreme Court, 1982 Term, 97 Harv.L. Rev. 70, 236-37 (1983), and has recently been reaffirmed by the Supreme Court. See Motor Vehicle Manuf. Ass'n v. State Farm Insur. Co., 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

Major policy choices affecting both energy conservation and the preservation of fish and wildlife were made by BPA during

its negotiation of over 140 power contracts. But without an EIS, we cannot know to what extent the many alternative proposals put forth by other groups and agencies were evaluated as alternatives to the provisions eventually adopted by BPA. Given BPA's statutory duty both to conserve energy use and to preserve fish and wildlife, 16 U.S.C. ## 839(3)(6), 839b(e)(2), (h)(10) & (11), and the multitude of alternative proposals suggested by government agencies and citizen groups, the failure to prepare an EIS demonstrating that the agency has considered all significant alternatives violates both NEPA and the APA.

Given the language and history of this Act, the lack of any mandated deadlines remotely similar to the 30 days in Flint Ridge, and the broad construction we are compelled to give NEPA, we must conclude

that there is no irreconcilable conflict between the Regional Act and NEPA requirements and that BPA violated NEPA when it offered contracts without developing an EIS.

Having agreed with plaintiffs that an EIS should have been prepared prior to the offer of contracts, and having disagreed with the government that Congress had mandated a time schedule which made preparation of an EIS impossible, we face the question of remedy. Forelaws asks this court not only to order BPA to comply with NEPA by preparing an environmental impact statement, but to enjoin the operation of the contracts until the EIS is prepared.

Forelaws correctly points out that an injunction is the most common judicial response to a NEPA violation, see, e.g., American Motorcyclist Association v. Watt, 714 F.2d 962, 965-66 (9th Cir.1983). The

purpose of enjoining government action pending preparation of the environmental impact statement is, generally, to maintain the status quo while additional environmental data is obtained, in order to preserve the decision makers' opportunity to choose among policy alternatives. See State of Alaska v. Andrus, 580 F.2d 465, 485 (D.C.Cir.1978); see also F. Grad, Treatise on Environmental Law, # 9.03(b) (1980).

In this unusual case, the major federal action subject to the requirements of NEPA constitutes ongoing 20-year contracts, most of which are now in the third year of their term. They have gone into effect pursuant to a statutory mandate requiring implementation of a contractual system no later than 21 months after enactment of the Regional Act, or by September, 1982. The history of the Regional Act reflects a certain amount of

urgency in preventing "an emerging customer struggle for BPA power." Central Lincoln Peoples' Utility District, 104 S.Ct. at 2476.

[743 F2d 686]

At this point in the history of the Regional Act, there is at least a clear tension between NEPA's charge to the agency to evaluate the effects of action upon the environment and the command of the Regional Act that the contracts be in place within 21 months of its passage. NEPA, however, allows for some flexibility in remedy because Congress has mandated compliance with NEPA procedures "to the fullest extent possible." Faced with reconciling NEPA and the Regional Act, we conclude that an injunction of the operation of the contracts themselves is inappropriate. See National Audubon Society, Inc. v. Watt, 678 F.2d 299, 309-10 (D.C.Cir. 1982) (NEPA

does not give the Secretary of Interior unlimited discretion to put off construction of a water development project that was statutorily authorized, relying upon Gulf Oil Corporation v. Morton, 493 F.2d 141, 146 (9th Cir.1973)).

Our decision not to enjoin the operation of the contracts does not render the case moot or deprive plaintiffs of any meaningful relief. The contracts will be in force for seventeen more years. Provisions in the contracts themselves contemplate changes in terms. All the contracts allow periodic adjustment of rates. All the contracts contain a clause setting forth the procedures for amendment. Most important for NEPA purposes, all the contracts include language "by which the parties ... agree to negotiate amendments to the power sales contracts, as necessary"

to coordinate the conservation, renewable resource, and fish and wildlife provisions with the regional plan. 46 Fed.Reg. 44344 (1981). Thus, the contracts are not completed projects for which an EIS will no longer be useful. Rather, they are agreements with the flexibility to accommodate the ongoing, changing relationship among BPA, its customers, and the public interest represented by the Regional Council established under the Act. 16 U.S.C. # 839b(a).

As the Supreme Court pointed out in Catholic Action of Hawaii, 454 U.S. at 143, 102 S.Ct. at 201, the purpose of NEPA is "to inject environmental considerations into the federal agency's decision-making process" and "to inform the public that an agency has considered environmental concerns in its decision-making process." Id. 102 S.Ct. at 201; see also 40 C.F.R.

1502.1. BPA's "Environmental Report" was not a sufficiently detailed analysis to inform BPA and the public of the environmental consequences of the choices represented by the contracts. Even less informative was the finding of no significant impact (FONSI) which BPA filed in connection with the contract amendments of October, 1982. /6/ Only a full environmental impact statement will inform BPA, its customers, the public and the Regional Council of all the environmental consequences of the contracts and serve as a guide to future actions. BPA must, therefore, perform an EIS on the contracts.

It is so ordered. The panel will retain jurisdiction over any further proceedings related to enforcement of this order.

ALL FOOTNOTES FOLLOW

1. The name Forelaws on Board is apparently derived from Barry Commoner's "four laws of ecology." B. Commoner, The Closing Circle (1971).

2. Section 102(2)(C) of NEPA requires that:

(T)o the fullest extent possible: ...

(2) all agencies of the Federal Government shall ...

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long--term productivity, and

(v) any irreversible and irretrievable

commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. # 4332 (Supp.1982).

3. In response to BPA's draft prototype power sales contracts published in the July 12, 1981 Federal Register, a number of groups including the Natural Resources Defense Council, the Environmental Protection Agency, Fair Electric Rates Now, and the Oregon Department of Energy commented on the conservation provisions.

4. Comments on the July 12, 1981 draft prototype sales contracts were received from groups including the Columbia River Citizens Compact, the Northwest Steelhead Salmon Council, the Upper Skagit Tribes, the National Marine and Fisheries Service, the Columbia River Fisherman's Protective Union, and the Washington Department of Fisheries.

5. Giving full deference to BPA's

interpretation of the Bonneville Power Act, which it administers, see Aluminum Co. of America v. Central Lincoln People's Utility District, --- U.S. ----, 104 S.Ct. 2472, 81 L.Ed. 2d 301 (1984); Chevron USA v. NRDC, --- U.S. ----, 104 S.Ct. 2778, 81 L. Ed.2d 694 (1984), we find its position is unreasonable, particularly when viewed in the light of the congressionally mandated objectives of NEPA.

6. Forelaws attempted to argue in this action that the October, 1982 contract amendments required an EIS. Because the amendments were clearly a "final action" within the meaning of the Regional Act, and because Forelaws did not separately challenge them or amend its complaint in the action to include them within the ninety days provided by the Act, the challenge is time barred.

APPENDIX D

August 20 1981 MEMORANDUM
REPLY TO CE/BPA-AP
ATTN OF
SUBJECT BPA Power Sales Contracts - Decision Not to Prepare an EIS
TO Assistant General Counsel for Environment

For the past several months there have been discussions regarding the necessity for preparation of an environmental impact statement (EIS) with respect to Bonneville Power Administration's (BPA) inital offering of long-term power sales contracts. It has been BPA's position throughout that time that the development of a proposal which could be subjected to meaningful evaluatiion was not possible prior to the development of prototype contracts which were completed only in early June 1981. It was further BPA's position that the decision process began in mid-July following a public comment period on the prototype contracts and that any EIS

on the prototype contracts and that any EIS in order to be meaningfully involved in the decision process and in the closing aspects of the negotiations of the contracts had to be available to the Administrator and the Public at that time. The conclusion followed that the development of a draft EIS which had to await the prototype contracts could not realistically lead to its writing, publication, offer for public review and comment, revision and response to such comment, republication as a final EIS and be available by mid-July when the decision process started. It was at that time anticipated the decision process and the last negotiations would be completed by late July or early August. The decision process and the last negotiations were completed in mid-August 1981. Thereafter, the production of the contracts into their

form for "initial offer" to all customers will commence wih a mailing anticipated on or before September 5, 1981. The concept is the mandate of Congress to "negotiate" on the development of the prototype contracts and to continue the negotiative process during and after the public comment period in complete good faith and for the purpose of establishing among all the customers of BPA and with BPA, the terms and conditions on which the long-term eomplex economic abnd electrical power arrangements are predicated is of great importance. The negotiation is among all customers of BPA, with the public generally as well as consumer groups, special interest groups, and some of the public utility officers of the Northwest States all taking part. The act of offering the contracts could only be performed after

good faith negotiation and the product of the negotiation had to be the contract offered.

The impossibility of doing an EIS did not eliminate other areas of NEPA compliance. BPA has developed an environmental report and is making a determined effort to develop environmental information related to contract issues as these issues are identified and make it available to all decisionmakers and especially to the Administrator.

Throughout the time of this disussion, a question that has occupied considerable time and attention is whether BPA could make a determination or whether consistent with DOE Order 5440.1A, section 5a(2), such decison had to be made by the Assistant Secretary for Environmental Protection, Safety and Emergency Preparedness.

It is not entirely clear that a delegation would be unnecessary in this instance, but we are prepared to proceed without formal delegation on the understanding that BPA has the authority necessary to take whatever action is deemeed appropriate by it in this instance. If for any reason you disagree with the poition that BPA has the authoriuty to act and to make that determina is not correct, please advise at once

[Signed] George E. Bell

[for] Omar W. Halvorson

Supreme Court, U.S.
FILED
JUN 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1494

In the Supreme Court of the United States

OCTOBER TERM, 1985

FORELAWS ON BOARD, ET AL., PETITIONERS

v.

PETER JOHNSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), the test for determining whether the government's position is "substantially justified," for purposes of denying attorneys' fees to the prevailing party, is one of reasonableness.

2. Whether the court of appeals erred in ruling that the government's position was substantially justified in the circumstances of this case.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals denying petitioners' application for attorneys' fees (Pet. App. A1-A2) is unreported. The opinion of the court of appeals on the merits (Pet. App. C1-C39) is reported at 743 F.2d 677.

JURISDICTION

The amended judgment of the court of appeals was entered on January 21, 1985 (Pet. App. C1). The petitioners' application for attorneys' fees was denied on July 3, 1985 (Pet. App. A1), and a petition for rehearing was denied on November 13, 1985

(Pet. App. B1). The petition for a writ of certiorari was filed on February 11, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Bonneville Power Administration (BPA) is the marketing agent for electric power from federal dams and other sources throughout the Pacific Northwest. Because of projected power shortfalls for that area, Congress in 1980 passed the Pacific Northwest Electric Power Planning and Conservation Act (the Regional Act), 16 U.S.C. 839 *et seq.* The Regional Act provided that "[a]s soon as practicable within nine months after December 5, 1980," BPA "shall commence necessary negotiations for, and offer, initial long-term contracts" to both preference and nonpreference customers (16 U.S.C. 839c (g)(1)).[1] Each customer offered a contract had one year from the date of the offer to accept "such contract." 16 U.S.C. 839c(g)(2). Thus, within 21 months after the Act's effective date, a new system of contracts allocating BPA's supply of power was to be in place. Pet. App. C5.

BPA interpreted Section 839c(g)(1) to require it to complete negotiations and make offers capable of acceptance by BPA's customers within nine months. Draft proposed contracts, the product of negotiations, were not available until six months of the nine-month period had passed. Because the re-

[1] Petitioners twice (Pet. 8, 9) assert that BPA had nine months to make initial *offers*. The statute clearly states, however, that BPA was to offer "initial long-term contracts"—*i.e.*, contracts it was prepared to live with—within nine months, and BPA therefore had only nine months to devise a set of contracts acceptable to it.

maining three months constituted insufficient time to prepare an Environmental Impact Statement (see 42 U.S.C. 4332(2)(c)) BPA concluded that, under *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776 (1976), an EIS was not required.[2]

Petitioners initiated a proceeding for review of the resulting contracts, seeking an injunction preventing implementation of the contracts and an order compelling preparation of an EIS (Pet. App. C3). Reasoning that BPA could have offered draft contracts prior to completion of negotiations and preparation of an EIS and that negotiations and preparation of an EIS could have continued during the entire 21-month period (Pet. App. C26-C27) the court of appeals ordered BPA to prepare an EIS. However, it denied petitioners' request for an order enjoining the operation of the contracts (Pet. App. C32-C35).

2. Petitioners then filed an application for attorneys' fees under the Equal Access to Justice Act (EAJA), which states in pertinent part that "[e]xcept as otherwise specifically provided by statute, a court shall award to a prevailing party * * * fees and expenses * * * in any civil action * * * against the United States * * * unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A). The court of appeals denied petitioners' application "because defendants' position in this case of first impression was substantially justified." Pet. App. A2. The court also held that petitioners are not entitled to fees un-

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[2] BPA did prepare an environmental analysis of the effects of the new power sales contracts and circulated it for review.

der 28 U.S.C. 2412(b) because the litigation did not produce a common fund or benefit.[3]

ARGUMENT

Petitioners' arguments concern the standard for determining whether or not the position of BPA was "substantially justified" for purposes of awarding attorneys' fees and expenses under 28 U.S.C. 2412 (d)(1)(A). The Ninth Circuit, in holding (Pet. App. A2) that the position of BPA was substantially justified, cited two previous decisions of that court which held that the test for substantial justification is whether the government's position had a reasonable basis in law and in fact. *United States* v. *First National Bank*, 732 F.2d 1444, 1447 (1984); *Foster* v. *Tourtellotte*, 704 F.2d 1109, 1112 (1983). Petitioners contend (Pet. 16) that the use of a reasonableness test for determining substantial justification is contrary to the intent of the Equal Access to Justice Act, and that a conflict in the circuit exists with respect to that question (Pet. 22-23). Petitioners also assert (Pet. 26-35) that BPA's position, which they say the court below found arbitrary and capricious, could not properly be held to be "substantially justified." None of these contentions has merit.

1. Petitioners' discussion of legislative intent intertwines the legislative history and judicial interpretation of that original EAJA and its 1985 replacement. The original EAJA was repealed by Pub. L. No. 96-481, § 204(c), 94 Stat. 2329, effective October 1, 1984. It was replaced by the 1985 Act, Pub. L. No. 99-80, § 2, 99 Stat. 184-185, which contained the identical language in 28 U.S.C. 2412(d)(1)(A).

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[3] Petitioners do not argue in this Court that the court of appeals erred in denying fees under 28 U.S.C. 2412(b).

But although no change was made in the "substantial justification" standard, the legislative history of the 1985 Act contains conflicting comments on the meaning of that standard. See pp. 8-10, *infra*.

We submit that this case is governed by the original EAJA, not by the 1985 Act.[4] The 1985 Act applies to "cases pending on" August 5, 1985, the date it was enacted. On that date, the only matter pending in the instant case was an application for rehearing en banc from the panel's denial of the fee application. Several courts have held that the original EAJA, which contained the same "cases pending" language, did not apply to cases in which only a fee application was pending on the date of enactment. *Tongol* v. *Donovan*, 762 F.2d 727, 730-733 (9th Cir. 1985); *Nichols* v. *Pierce*, 740 F.2d 1249, 1255-1258 (D.C. Cir. 1984); *Commissioners of Highways* v. *United States*, 684 F.2d 443, 444-445 (7th Cir. 1982). The Fifth Circuit has applied what it described as a "clarifying provision" contained in the 1985 Act to a case in which only the fee application was pending on August 5, 1985. *Russell* v. *National Mediation Board*, 775 F.2d 1284, 1286-1287 (5th Cir. 1985).[5] The Ninth Circuit, however, has recently distinguished *Russell* in a case involving a "change" made by the 1985 Act, ruling that the change was not applicable to a case where only the fee application was pending at enactment. *American*

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[4] The court of appeals found it unnecessary to determine whether the original EAJA or the 1985 Act was to be applied. In any event, the question of which Act applies has little continuing importance.

[5] See also *Gavette* v. *Office of Personnel Management*, 785 F.2d 1568, 1579 (Fed. Cir. 1986), and *Gotches* v. *Heckler*, 782 F.2d 765, 766-767 (7th Cir. 1986), following *Russell*.

Pacific Concrete Pipe Co. v. *NLRB*, 788 F.2d 586 (1986).

The legislative history of the EAJA as enacted in 1980 expressly states that "[t]he test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact." H.R. Conf. Rep. 96-1434, 96th Cong., 2d Sess. 22 (1980). See also H.R. Rep. 96-1418, 96th Cong., 2d Sess. 10, 13-14, 18 (1980); H.R. Rep. 96-1005, 96th Cong., 2d Sess. Pt. 1, at 10 (1980); and S. Rep. 96-253, 96th Cong., 1st Sess. 7 (1979). Insofar as the original EAJA governs this case, the Ninth Circuit's use of the reasonableness standard is thus entirely consistent with Congress's own interpretation of "substantial justification."

The term "substantial justification" was repeatedly interpreted, in cases arising under the EAJA as originally enacted, as requiring only that the government show that its position had a reasonable basis. *Dubose* v. *Pierce*, 761 F.2d 913, 917-918 (2d Cir. 1985); *Donovan* v. *DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1389 (3d Cir.), cert. denied, No. 84-2018 (Oct. 21, 1985); *Anderson* v. *Heckler*, 756 F.2d 1011, 1013 (4th Cir. 1985); *Hanover Building Materials, Inc.* v. *Guiffrida*, 748 F.2d 1011, 1015 (5th Cir. 1984); *Trident Marine Construction* v. *District Engineer*, 766 F.2d 974, 980 (6th Cir. 1985); *Ramos* v. *Haig*, 716 F.2d 471, 473 (7th Cir. 1983); *Keasler* v. *United States*, 766 F.2d 1227, 1231 (8th Cir. 1985); *Albrecht* v. *Heckler*, 765 F.2d 914, 915 (9th Cir. 1985); *United States* v. *Community Bank & Trust Co.*, 768 F.2d 311, 314 (10th Cir. 1985); *Ashburn* v. *United States*, 740 F.2d 843, 850 (11th Cir. 1984); *Broad Avenue Laundry & Tailoring* v. *United States*, 693 F.2d 1387, 1391 (Fed. Cir. 1982).

The District of Columbia Circuit was the only court of appeals that had suggested that, under the original EAJA, the test "should, in fact, be slightly more stringent than 'one of reasonableness.'" *Spencer* v. *NLRB*, 712 F.2d 539, 558 (1983) (footnote omitted), cert. denied, 466 U.S. 936 (1984).[6] That court subsequently held that the government's position must be more than "'facially' reasonable" (*Cinciarelli* v. *Reagan*, 729 F.2d 801, 806 (D.C. Cir. 1984)), and that the government's position must have a "solid basis in fact and law." *Grace* v. *Burger*, 763 F.2d 457, 458 (D.C. Cir. 1985), cert. denied, No. 85-5557 (Dec. 9, 1985). But it also applied the same reasonableness test applied in the other circuits (*Hirschey* v. *FERC*, 760 F.2d 305, 309 (D.C. Cir. 1985)), so that there may be only a semantic distinction between the standard for substantial justification enunciated by the District of Columbia Circuit and the reasonableness test employed by all other circuits under the original EAJA. Since there may not be any functional difference between the two tests, and since the denial of fees in this case was appropriate in any event (see pp. 10-13, *infra*) review by this Court is not warranted.[7]

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[6] The court of appeals in *Spencer* referred to the committee reports cited above, but noted that the Senate Judiciary Committee had rejected an amendment to the bill that would have changed the phrase "substantially justified" to "reasonably justified." 712 F.2d at 557-558; see S. Rep. 96-253, *supra*, at 8. The joint conference report, which expressly adopts the reasonableness test for substantial justification, H.R. Conf. Rep. 96-1434, *supra*, at 22, is, however, a better indicator of congressional intent. See *United States* v. *Kemper Money Market Fund, Inc.*, 781 F.2d 1268, 1279 n.5 (7th Cir. 1986).

[7] This Court has recently declined to resolve a similar semantic difference in the circuits over the appropriate stand-

Petitioners also assert (Pet. 17) that certain statements in the legislative history of the 1985 Act, Pub. L. No. 99-80, 99 Stat. 183 *et seq.*, support their contention that "substantial justification" requires more than a showing of reasonableness. But even if the 1985 Act is applicable to this case, it would be wrong to read the conflicting comments in its legislative history as changing the law when the net result of the legislative process was that the 1985 Act adopted the same "substantial justification" standard as its predecessor. 28 U.S.C. 2412(d)(1)(A).

The House Report accompanying the bill does include the following comment on the test for substantial justification:

> Several courts have held correctly that "substantial justification" means more than merely reasonable. Because in 1980 Congress rejected a standard of "reasonably justified" in favor of "substantially justified," the test must be more than mere reasonableness.
>
> Especially puzzling, however, have been statements by some courts that an administrative decision may be substantially justified under the Act even if it must be reversed because it was arbitrary and capricious or was not supported by substantial evidence. Agency action found to be arbitrary and capricious or unsupported by substantial evidence is virtually certain not to have been substantially justified under the Act.

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ard for judicial review of an agency decision not to prepare an EIS. *Dravo Basic Materials Co.* v. *Louisiana*, cert. denied, No. 85-569 (Mar. 3, 1986); *River Road Alliance, Inc.* v. *Corps of Engineers*, cert. denied, Nos. 85-785 and 85-800 (Mar. 3, 1986); cf. *Gee* v. *Boyd*, cert. denied, No. 84-1062 (Apr. 22, 1985).

H.R. Rep. 99-120, 99th Cong., 1st Sess. 9-10 (1985) (footnotes omitted).[8] But the statements made in the House Report regarding the substantial justification standard were characterized as unrepresentative of the intent of the committee and were clarified during floor debates in both the House and the Senate. See 131 Cong. Rec. H4763 (daily ed. June 24, 1985), and 131 Cong. Rec. S9992-S9993 (daily ed. July 24, 1985).

The House Report's explanation of the substantial justification standard was directly contradicted by statements made during floor debates by three of the bill's co-sponsors. For example, Representative Kindness described the excerpt quoted above as a "gratuitously authoritarian overstatement" and "the only error I found in the report. * * * The committee report statement should not be interpreted to be the position of the committee on the point it seeks to describe" (131 Cong. Rec. H4763 (daily ed. June 24, 1985)). See also the comments of Representative Kastenmeier (*ibid.*), and Sen. Thurmond, 131 Cong. Rec. S9993 (daily ed. July 24, 1985). Moreover, in signing the 1985 Act, President Reagan stated that "it is my understanding * * * that the Congress recognized the important distinction between the substantial justification standard in the fee proceeding and a court's finding on the merits that an agency action was arbitrary and capricious or not supported by substantial evidence." 21 Weekly Comp. Pres. Doc. 967 (Aug. 6, 1985). In view of Congress's reenactment of the same statutory language of 28 U.S.C. 2412(d)(1)(A), which had been

[8] A similar statement is found in the legislative history of another version of the EAJA, passed by Congress in 1984 but vetoed by the President. See S. Rep. 98-586, 98th Cong., 1st Sess. 10 (1984) and 42 Cong. Q. Weekly Rep. 2964 (1984).

repeatedly interpreted to impose a "reasonableness" test, the floor debates in both Houses, and the President's clear expression of intent in his signing statement, there is no basis for petitioners' assertion that the court of appeals erred in relying on cases articulating a reasonableness test.

One court of appeals has interpreted the 1985 Act to impose a more stringent test than reasonableness. *Gavette* v. *Office of Personnel Management*, *supra* (position must be "clearly reasonable"). Five other circuits have applied the traditional reasonableness test in decisions entered after the effective date of the 1985 Act without discussing whether there is any difference between the two Acts in this respect. *United States* v. *Yoffe*, 775 F.2d 447, 449-450 (1st Cir. 1985); *USLIFE Title Ins. Co.* v. *Harbison*, 784 F.2d 1238, 1242 (5th Cir. 1986); *United States* v. *Kemper Money Market Fund, Inc.*, 781 F.2d 1268, 1274 (7th Cir. 1986); *In re Hill*, 775 F.2d 1037, 1042 (9th Cir. 1985); *Porter* v. *Heckler*, 780 F.2d 920, 922 (11th Cir. 1986).

2. In any event, whichever statute applies and whether or not the 1985 Act requires a somewhat heightened scrutiny of the government's position, the court of appeals' conclusion that the government's position "was substantially justified" was correct. Petitioners assert (Pet. 26-35) that the court of appeals found BPA's position "arbitrary and capricious" and then contend that agency action held to be arbitrary and capricious cannot, as a matter of law, have been substantially justified. That is just wrong. First, while the court below did rule that BPA's action violated NEPA and said at one point (Pet. App. C39 n.5) that BPA's position was unreasonable, it did not find that action arbitrary and

capricious. See *Lathan* v. *Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974).[9] Loss of a case does not, of course, mean that the government's position was not substantially justified (H.R. Rep. 96-1418, *supra*, at 11), even if the government's actions were held to have been arbitrary and capricious. *Essex Electro Engineers, Inc.* v. *United States*, 757 F.2d 247, 253 (Fed. Cir. 1985).

Here, there was ample basis for the court of appeals to find that BPA's position was substantially justified. BPA's principal argument in this case was that the deadlines imposed by Congress in the Regional Act for the offer of contracts to BPA's customers made it impossible to prepare an EIS, and eliminated any requirement for one. Pet. App. C18-C19. In support of this position, BPA relied on *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n*, *supra*, in which this Court held that, when there is a "fundamental conflict of statutory duty," NEPA's impact statement requirement is inapplicable. 425 U.S. at 791. The Ninth Circuit rejected this argument, distinguishing the statutory deadlines in the Regional Act from the mandated deadlines in the statute at issue in *Flint Ridge*, and held that "there is no irreconcilable conflict between the Regional Act and NEPA requirements" (Pet. App. C30-C31). The court of appeals noted, however, that "there is at least a clear tension between NEPA's charge to the agency to evaluate the effects of action upon the environment and the command of the Regional Act that the contracts be in place within 21 months of its passage" (Pet. App. C33). The court consequently

[9] The words "arbitrary and capricious" were used in an explanation of the importance of an EIS in formulating agency policy, *not* to characterize BPA's decision that no EIS was required here. See Pet. App. C29.

declined the request of petitioners to enjoin the operation of the contracts. *Ibid.*[10]

The Ninth Circuit, in its denial of petitioners' fee application, described this case as a "case of first impression" (Pet. App. A2). Petitioners suggest (Pet. 14) that the court has "announced a rule that the government's position is always substantially justified in any case of 'first impression.' " This suggestion is without merit. The fact that a case is one of first impression is a factor properly relevant to the substantial justification determination. *In re Hill*, 775 F.2d at 1042; *United States* v. *Yoffe*, 775 F.2d at 451; *DuBose* v. *Pierce*, 761 F.2d at 918-919; *Sigmon Fuel Co.* v. *TVA*, 754 F.2d 162, 167 (6th Cir. 1985); *Herring* v. *United States*, 781 F.2d 119, 121-122 (8th Cir. 1986). Although petitioners correctly point out (Pet. 14-16) that the government's position is not necessarily substantially justified simply because the case is one of first impression (see *Devine* v. *Sutermeister*, 733 F.2d 892, 895 (Fed. Cir. 1984)), it is well established that the government may meet its burden under 28 U.S.C. 2412(d)(1)(A) by showing that its position was a "novel but credible extension or interpretation of the law." H.R. Rep. 96-

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[10] BPA also argued that an EIS was unnecessary because the power delivery contracts themselves do not significantly affect the human environment. Pet. App. C11. In support of this contention, the BPA relied on two Ninth Circuit decisions, *City of Santa Clara* v. *Andrus*, 572 F.2d 660, cert. denied, 439 U.S. 859 (1978); and *Sierra Club* v. *Hodel*, 544 F.2d 1036 (1976), for the proposition that federal agency actions that merely allocate federal power to different customers do not significantly affect the environment. Pet. App. C14. The court of appeals agreed that "BPA accurately characterizes the holding of these cases" (*ibid.*), but held that they were not controlling. Pet. App. C14-C18.

1418, *supra*, at 11. The court of appeals in this case, which involves the first NEPA challenge to actions taken pursuant to the Regional Act, clearly did not in its summary opinion rejecting petitioners' fee application set forth a *per se* rule regarding cases of first impression. Instead, it acted well within its discretion in denying petitioners' fee application.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] Petitioners also argue extensively (Pet. 32-35) that the "position of the United States" includes the underlying agency position as well as the government's litigation position. This argument merely restates what is clearly the law in the Ninth Circuit. *Rawlings* v. *Heckler*, 725 F.2d 1192, 1195-1196 (1984). The 1985 Act also adopts this view, rejecting the holdings of those circuits that had limited judicial review to the government's litigation position. See H.R. Rep. 99-120, *supra*, at 9, 11-13, 16.

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